

OFFICIAL FILE

ILLINOIS COMMERCE COMMISSION

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

ORIGINAL

Verizon Wireless LLC, d/b/a Verizon Wireless; }
VoiceStream PCS I, LLC, d/b/a T-Mobile; }
VoiceStream GSM I Operating Company, LLC; }
d/b/a T-Mobile; Omnipoint Holdings, Inc. d/b/a }
T-Mobile; Powertel/Kentucky, Inc., d/b/a T- }
Mobile; NPCR, Inc., d/b/a Nextel Partners; }
Nextel Partners Operating Corp.; AT&T Wireless }
PCS, LLC and TeleCorp. Communications, Inc., }
d/b/a AT&T Wireless }

Petitioners }

vs. }

Adams Telephone Co-Operative; Alhambra- }
Grantfork Telephone Company; C-R Telephone }
Company; Cass Telephone Company, Egyptian }
Telephone Cooperative Association, Inc; El Paso }
Telephone Company; Flat Rock Telephone Co- }
Op, Inc.; Grafton Telephone Company; Hamilton }
County Telephone Co-Op; Home Telephone }
Company; Laharpe Telephone Company; }
Marseilles Telephone Company; McDonough }
Telephone Co-Operative, Inc.; McNabb }
Telephone Company; Metamora Telephone }
Company; Mid-Century Telephone Co- }
Operative, Inc.; Odin Telephone Exchange, Inc; }
Shawnee Telephone Company; Yates City }
Telephone Company }

Respondents }

**Petition for Investigation of Wireless }
Termination Tariffs }**

Docket No. 04-0040

CHIEF CLERK'S OFFICE

2004 FEB 18 P 4 46

ILLINOIS
COMMERCE COMMISSION

**MOTION TO DISMISS PETITION OF VOICESTREAM PCS I, LLC, D/B/A T-MOBILE,
VOICESTREAM GSM I OPERATING COMPANY, LLC; D/B/A T-MOBILE,
OMNIPPOINT HOLDINGS, INC. D/B/A T-MOBILE, AND POWERTEL/KENTUCKY, INC.,
D/B/A T-MOBILE AND RECONSIDER RULING OF ADMINISTRATIVE LAW JUDGE
AND TO DECLARE RULE INVALID AND FOR OTHER RELIEF.**

NOW COMES ALHAMBRA-GRANTFORK TELEPHONE COMPANY ("Alhambra"), by its
attorney, Gary L. Smith, of LOEWENSTEIN, HAGEN & SMITH, P.C., and hereby moves to
dismiss the above-captioned proceeding as to VoiceStream PCS I, LLC, d/b/a T-Mobile;

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Ret.
2-15-04
est.

VoiceStream GSM I Operating Company, LLC; d/b/a T-Mobile; Omnipoint Holdings, Inc. d/b/a T-Mobile; and Powertel/Kentucky, Inc., d/b/a T-Mobile ("T-Group") to vacate the ruling to allow Philip Schenkenberg to appear as counsel; to declare a portion of 83 Ill.Adm.Code Part 200.90(a) invalid; and states as follows:

1. On or about January 20, 2004, Philip R. Schenkenberg, of Briggs and Morgan, P.A., and Michele Thomas, corporate counsel in Bettsville, Maryland, filed a Petition on behalf of VoiceStream PCS I, LLC, d/b/a T-Mobile, VoiceStream GSM I Operating Company, LLC, d/b/a T-Mobile, Omnipoint Holdings, Inc., d/b/a T-Mobile, and Powertel/Kentucky, Inc., d/b/a T-Mobile; ("T-Mobile Group") for an investigation of Alhambra's Wireless Termination Tariff. According to the records of the clerk of the Illinois Supreme Court, Ms. Thomas is not licensed to practice law in the State of Illinois. (See affidavit of Gary L. Smith attached.) During the status hearing of February 9, 2004, Mr. Schenkenberg stated that he is not licensed to practice in Illinois and he made a motion to be allowed to appear in this proceeding, which was granted by the Administrative Law Judge ("ALJ") over the objection of Alhambra-Grantfork Telephone Company.

2. 220 ILCS 5/10-101 states, in part:

When any counselor or attorney at law, licensed in any other state or territory, may desire to appear before the Commission, such counselor or attorney shall be allowed to appear before the Commission upon the same terms and in the same manner that counselors and attorneys at law licensed in this State now are or hereafter may be admitted to appear in such other state or territory before its Commission or equivalent body.

3. The Rules of the Commission at 83 Ill.Adm.Code Part 200.90 state in par. c that only persons admitted to practice as attorneys and counselors at law shall represent

others in proceedings before this Commission in any matter involving the exercise of legal skill or knowledge. Furthermore, Sec. 200.90(a) states:

Any party may appear by an attorney at law authorized to practice in the State of Illinois; attorneys admitted to practice in states other than Illinois may appear and be heard upon special leave of the Hearing Examiner in particular cases. In determining whether to grant such leave, the Hearing Examiner shall consider, in addition to the goals set forth in Section 200.25, whether the state in which the attorney is admitted to practice grants leave to Illinois attorneys in similar situations.

4. The instant petition seeks to investigate Alhambra's tariff. An investigation requires notice and hearings under 220 ILCS 5/13-504, and, therefore, unquestionably involves the practice of law.

5. The Commission has no authority to implement a rule in derogation of the statute. *Franz v. Edgar*, 133 Ill.App.^{3d} 513, 88 Ill.Dec. 557 (1985) (administrative rule providing that individual with multiple driving under the influence convictions is not eligible to have driver's license reinstated for five years is invalid as nullifying and making meaningless statute which expressly authorizes reinstatement applications within one year); *Scalz v. McHenry County Sheriff's Dept.*, 113 Ill.^{2d} 198, 100 Ill.Dec. 553 (1986); *Collins v. Towle*; 3 Ill.App.^{3d} 753 (1972); *Harrisonville Telephone Company v. Ill.Com.Com.*, 176 Ill.App.^{3d} 389, 125 Ill.Dec. 864 (1988). To the extent an administrative rule conflicts with the statute, the rule is invalid. *Matthews v. Will County Department of Public Aid*, 152 Ill.App.^{3d} 400, 105 Ill.Dec. 429 (1987); *Kaufman Grain Co. v. Director of Dept. of Agriculture*, 179 Ill.App.^{3d} 1040, 128 Ill.Dec. 654 (1988).

6. In *Citizens Organizing Project v. Dept. of Natural Resources*, 189 Ill.^{2d} 593, 244 Ill.Dec. 896 (2000), the Illinois Supreme Court declared that the group that

obtained a ruling that an administrative rule was invalid was entitled to all its litigation expenses even though the group did not prevail on the merits of the challenge. Accordingly, Alhambra-Grantfork Telephone Company hereby gives notice that it is challenging the validity of 83 Ill.Adm.Code Part 200.90(a) insofar as the rule authorizes the ALJ (hearing examiner) to grant leave to admit attorneys licensed to practice in states other than Illinois to appear and be heard in cases before the Illinois Commerce Commission that involve the practice of law in Illinois, and Alhambra-Grantfork Telephone Company hereby gives further notice that it will seek litigation expenses and attorney's fees in any judicial review pursuant to 5 ILCS 100/10-55. The supreme court declared in *Citizens*, that compensation for litigation expenses are not limited to those expenses directly related to the question of the rule's validity. *Citizens Organizing Project* 189 Ill.^{2d} @ 599.

7. Despite the language in 220 ILCS 5/10-101 and in 83 Ill.Adm.Code Section 200.90(a), it was reversible error to grant leave to Mr. Schenkenberg to appear in Alhambra's case. Neither the ALJ nor the Commission is empowered to grant leave to any out-of-state attorney to practice law within the State of Illinois, since that is a function exclusively within the judicial power of Article VI, sec. 1 under the 1970 Illinois Constitution. The ALJ exceeded his authority in granting Mr. Schenkenberg's Motion to Appear as counsel in this proceeding for the T-Mobile Group against Alhambra and that ruling must be reversed.

8. The question of whether an administrative agency may authorize a person who is not licensed as an attorney in Illinois to practice law before it was addressed by the Illinois Supreme Court in *People ex rel. The Chicago Bar Ass'n v. Goodman* (1937), 366 Ill. 346, 352, cert. denied, 302 U.S. 728, 58 S. Ct. 49 (1937). The defendant in that

case engaged in a rather extensive business of assisting injured workers with the adjustment of claims before the Illinois Industrial Commission. The court stated:

* * *

* * * The respondent urges that because the legislative act relating to the Industrial Commission grants to that body the right to promulgate rules governing the procedure before it, and the commission has adopted a rule permitting a party to appear before it by his attorney or 'agent,' that he, as agent of the claimant, may lawfully appear before the commission as the representative of the client and try his claim there. Even though the Industrial Commission is merely an administrative body, yet, if what the respondent did for a fee, in the presentation of and hearing of a petitioner's claim before that body, amounted to the practice of law, a rule of the commission purporting to grant him that privilege is of no avail to him. The General Assembly has no authority to grant a layman the right to practice law (Citation). It follows that any rule adopted by the commission, purporting to bestow such privilege upon one not a duly licensed attorney at law, is void. Nor can the General Assembly lawfully declare not to be the practice of law, those activities the performance of which the judicial department may determine is the practice of law. (Emphasis added.)

9. Our appellate court acknowledged the general rule in *Perto v. Board of Review* (1995), 274 Ill.App.^{3d} 485, 493, *appeal denied*, 164 Ill.^{2d} 581, stating:

However, in Illinois, only licensed attorneys are permitted to practice law. (705 ILCS 205/1 (West 1992).) The legislature has no authority to grant a nonattorney the right to practice law even if limited to practice before an administrative agency. (*People ex rel. Chicago Bar Association v. Goodman* (1937), 366 Ill. 346, 352, 8 N.E.^{2d} 941.) The ultimate authority to regulate and define the practice of law rests with the supreme court. *Goodman*, 366 Ill. at 349, 8 N.E.^{2d} 941. 274 Ill.App.^{3d} at 493.

10. Citing *Goodman, supra*, the supreme court explicitly held in *Lozoff v. Shore Heights, Ltd.*, 66 Ill.^{2d} 398, 402 (1977), that the General Assembly has no authority to regulate the practice of law. See also, *Real Estate Buyers Agents v. Foster*, 234, Ill.App.^{3d} 257 (1992) (statute providing that corporations could appear in small claims

proceedings as pro se plaintiffs through an officer of corporation would not be upheld as the statute directly conflicted with Supreme Court Rule 282(b) providing that no corporation could appear as plaintiff in a small claims proceeding unless represented by counsel.)

11. Supreme Court Rule 707 provides:

Anything in these rules to the contrary notwithstanding, an attorney and counselor-at-law from any other jurisdiction in the United States, or foreign country, may in the discretion of any court of this State be permitted to participate before the court in the trial or argument of any particular cause in which, for the time being, he or she is employed. (Emphasis added.)

12. Legislative attempts to regulate judicial procedures that conflict with existing supreme court rules violate the separation of powers clause in Article II, Section 1 of the Illinois Constitution and are unconstitutional encroachments on the Article VI, Sec. 1 judicial power of the supreme court. *E.g., People v. Jackson*, 69 Ill.^{2d} 252, 13 Ill.Dec. 667 (1977); see also, *Consumers Gas v. Ill.Com.Com.*, 144 Ill.App.^{3d} 229, 236 (1986).

13. Where a rule of the supreme court on a matter within the court's authority and a statute on the same subject conflict, the supreme court's rule will prevail. *O'Connell v. St. Francis Hospital*, 112 Ill.^{2d} 273, 280-81 (1986); *People v. Williams*, 143 Ill.^{2d} 477, 483 (1991).

14. Under Supreme Court Rule 707, the supreme court specifically empowers Illinois courts to permit the participation of attorneys who are licensed in other jurisdictions. The rule does not refer to proceedings held before administrative agencies, or conducted by officers of the executive branch of government. In no reported case has Rule 707 been applied to authorize administrative law judges (who look solely to the legislature, not to the courts) to grant leave to practice law in Illinois.

The Illinois Supreme Court has exclusive power to determine who shall be permitted to practice law in Illinois. *Lozoff v. Shore Heights, Ltd. supra.* Therefore, attorneys licensed in other states who wish to represent clients in administrative proceedings within the State of Illinois must petition an appropriate court of this state for permission to do so, and the Commission cannot rely on an invalid statute and rule to authorize the practice of law before the Commission.

15. In *Lozoff v. Shore Heights, Ltd.*, 66 Ill.^{2d} 398, 401 (1977), a Wisconsin attorney arranged a real estate transaction among parties who were residents of Illinois. The court held that the attorney had engaged in the unauthorized practice of law in Illinois and was not entitled to attorney's fees. Therefore, the unauthorized practice of law performed cannot be compensated.


16. The Illinois Commerce Commission derives its power and authority from the Public Utilities Act, *Union Electric Co. v. Ill.Com.Com.*, 77 Ill.App.^{2d} 364, 383, 396, N.E.^{2d} 510, 519 (1979). The Commission's authority is limited to that which has been expressly conferred upon it by the legislature, *Illinois Consolidated Telephone Company v. Ill.Com.Com.*, 95 Ill.^{2d} 142, 207, 447 N.E.^{2d} 295 (1983), but only to the extent that the legislature is constitutionally authorized to grant powers. The Commission has no implied powers and may not, by its own act, extend its jurisdiction. *E.g.*, *Peoples Energy Corp. v. Ill.Com.Com.*, 142 Ill.App.^{3d} 917, 923, 492 N.E.^{2d} 551 (1986). Any action by the Commission in excess of its authority is void. *Blackhawk Transit Co. v. Ill.Com.Com.*, 398 Ill. 542, 552, 76 N.E.^{2d} 478 (1947); *Harrisonville Tel. Co. v. Ill.Com.Com.*, 176 Ill.App.^{3d} 389, 125 Ill.Dec. 864 (1988). Both 220 ILCS 5/10-101 and 83 Ill.Adm.Code Part 200.90 are void and exceed the constitutional authority of the Legislature and Commission.

17. The filing of the instant petition on behalf of VoiceStream PCS I, LLC, d/b/a T-Mobile; VoiceStream GSM I Operating Company, LLC; d/b/a T-Mobile; Omnipoint Holdings, Inc. d/b/a T-Mobile; and Powertel/Kentucky, Inc., d/b/a T-Mobile by an unauthorized attorney was a void act and the instant petition must be dismissed as to VoiceStream PCS I, LLC, d/b/a T-Mobile, VoiceStream GSM I Operating Company, LLC, d/b/a T-Mobile, Omnipoint Holdings, Inc. d/b/a T-Mobile, and Powertel/Kentucky, Inc., d/b/a T-Mobile as to Alhambra's Wireless Termination Tariff.

WHEREFORE, ALHAMBRA-GRANTFORK TELEPHONE COMPANY respectfully prays that the Commission's Rule at 83 Ill.Adm.Code Sec. 200.90(a) be declared invalid and unlawful and that the Administrative Law Judge reverse his ruling granting Philip Schenkenberg leave to appear on the petition for investigation of Alhambra's tariff and that the petition of VoiceStream PCS I, LLC, d/b/a T-Mobile; VoiceStream GSM I Operating Company, LLC; d/b/a T-Mobile; Omnipoint Holdings, Inc. d/b/a T-Mobile; and Powertel/Kentucky, Inc., d/b/a T-Mobile be dismissed, and for such other and further relief as is deemed just.

Respectfully submitted,

ALHAMBRA-GRANTFORK TELEPHONE COMPANY



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CERTIFICATE OF SERVICE

Docket No. 04-0040

The undersigned certifies that a copy of the foregoing instrument was served upon the following persons by electronic mail and by enclosing the same in an envelope addressed to such person at their address as follows with postage fully prepaid, and by depositing said envelope in a U.S. Post Office Mail Box in Springfield, Illinois on this 18th day of February, 2004.

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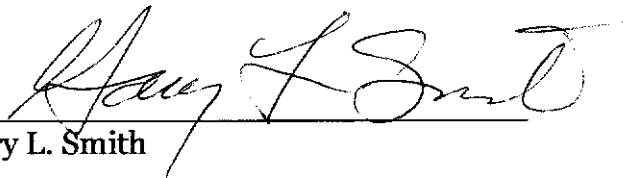
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